

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 13 February 2008

Public Authority: Ministry of Justice
Address: Selborne House
54-60 Victoria Street
London
SW1E 6QW

Summary

The complainant asked the public authority for a complete database data dump in machine-readable format of information from its Statute Law Database editing system or, failing that, from its 'Documents' database. The public authority refused the primary request as exceeding the 'appropriate limit' of £600, and the alternative request as being exempt under sections 22 and 43(2) of the Freedom of Information Act 2000. The Commissioner decided that the primary request was indeed exempt by virtue of section 12, but that neither section 22 nor section 43 applied to the alternative request, which should therefore be disclosed.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the 'Act'). This Notice sets out his decision.

The Request

2. The complainant wrote to the Department for Constitutional Affairs (DCA) (now the Ministry of Justice) on 18 September 2005 requesting information about its statute law database ('the database'). He required '*A complete database data dump in machine-readable format of current statute law from the newly implemented Statute Law Database editing system*'. He specified that, if this was not available, he wanted '*A data dump of the data from the "Documents" database, as described in Annex D2 of the document "Specification of the Provision of a Statute Law Database System"*' (what is referred to in this Decision Notice as the 'alternative request').

3. DCA replied on 13 October 2005. It claimed that the construction of the database was such that the cost of determining whether the requested information was held, and of locating, retrieving and extracting it, would exceed the 'appropriate limit' of £600 (which translated into approximately 3½ working days of staff time). Consequently, it concluded that it was not obliged to comply with the request. It advised the complainant of his right to an internal review.
4. The complainant requested an internal review on 29 November 2005.
5. On 7 February 2006 DCA informed the complainant that it had concluded that the original decision was correct in relation to the primary request. However, in relation to the alternative request it stated that it was not satisfied that the cost of providing the information would exceed the 'appropriate limit'. However, it refused the alternative request too, citing section 22(1) and section 43(2) of the Act, which it noted would also have applied to the primary request had that not exceeded the limit. In relation to section 22(1) it stated that the database was still under development but was planned to be piloted for public access in April 2006 with a view to release later in the year. It referred the complainant to his right to approach the Information Commissioner.

The Investigation

Scope of the case

6. On 21 April 2006 the complainant contacted the Commissioner to complain about the way his request for information had been handled. He expressed his disbelief that the cost of providing a data dump would exceed £600. He also stated that section 22(1) did not apply because DCA had not stated an intention to publish the statute law database in machine-readable format. In relation to section 43(2) he complained that the public interest test had not been properly applied because it had failed to take into account the public interest of people being able to access the 'law of the land'. He also claimed that DCA had failed to provide him with advice and assistance in accordance with its obligations under section 16 of the Act, since it had made no effort to help him reword the request.

Chronology

7. On 16 August 2007 the Commissioner wrote to the Ministry of Justice (MoJ), which had succeeded DCA, and the complainant, inviting their comments.
8. The Commissioner sent a reminder to the MoJ on 16 September 2007, and in the absence of a response notified the MoJ 4 October 2007 of his intention to issue an Information Notice.
9. The MoJ provided a substantive response to the Commissioner's queries on 24 October 2007.

10. The Commissioner asked the MoJ on 21 December 2007 to provide further clarification of its application of section 12.
11. On 4 January 2008 the MoJ sent the Commissioner its cost calculations.

Findings of fact

12. The MoJ has advised the Commissioner that its Statute Law Database 'went live' on 20 December 2006. It can be found at www.statutelaw.gov.uk.

Analysis

Procedural matters

13. The complainant claimed that the MoJ had failed to provide him with advice and assistance in accordance with its obligations under section 16 of the Act, since it had made no effort to help him reword his request so that the MoJ could comply with it. In light of his assessment of the section 43 exemption (below), the Commissioner does not believe that there was any advice and assistance that the MoJ could have provided that would have allowed the primary request to be modified to such an extent that the information could have been released. In the circumstances he does not consider that this complaint is justified.
14. In this case the complainant requested a data dump in machine-readable format of the information in the MoJ's statute law database, or alternatively a data dump from the 'Documents' database. The MoJ rejected the primary request by reference to the 'appropriate limit' under section 12 of the Act, and the alternative request by application of sections 22(1) and 43(2) of the Act.

Section 12

15. Section 12(1) states:

'Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.'

Accordingly, section 12 provides that a public authority is not obliged to comply with a request for information if it estimates that meeting the request would exceed the appropriate cost limit. The appropriate limit is currently set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ('the Regulations') and is currently set at £600 (which equates to 3½ days work at £25 per hour).

16. The complainant requested 'A complete database data dump in machine-readable format of current statute law from the newly implemented Statute Law Database editing system'. He specified that, if this was not available, he wanted 'A data dump of the data from the "Documents" database, as described in Annex

D2 of the document "Specification of the Provision of a Statute Law Database System". The MoJ originally applied section 12 to both the primary and alternative requests. However, at the internal review stage it stated that it was not satisfied that the cost of providing the information in the alternative request would exceed the 'appropriate limit'. The Commissioner has therefore restricted his consideration of section 12 to the question of whether it applies to the primary request.

17. In its letter of 4 January 2008 the MoJ explained its calculation of the cost of complying with the original request. It pointed out that database dumps required the Statutory Publications Office to raise an order with an IT contractor. Multiplying that cost by the number of database dumps required to comply with the original request, the MoJ had calculated that the total cost of obtaining the data would amount to £1,256, without including additional resource costs which would be incurred in raising and processing the order. In the circumstances, the Commissioner is satisfied that it was reasonable for the MoJ to have decided that section 12 applied to the primary request. Since it was appropriate for the MoJ to have withheld the information in the primary request by reference to section 12, the Commissioner has not gone on to consider whether sections 22 and 43 applied to that request.

Exemption – section 43(2)

18. In relation to the alternative request, the MoJ applied section 43. Section 43(2) provides that:

'Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).'

19. The Commissioner notes that the requested information relates to data underpinning a website library of statute laws. The MoJ informed the complainant in its letter of 7 February 2006 that the data:

'constitutes commercially valuable information. The Statutory Publications Office is required to develop a commercial strategy in line with the government's Wider Markets Initiative...It is...envisaged that commercial contracts will be entered into with private organisations for the supply of the data, or extracts of the data, for re-use in their applications...It is likely that...a private sector partner will be found to assist the Department in exploiting the commercial value of the data'.

The Commissioner accepts that the data is commercially marketable and that it is therefore information with potential commercial value to the MoJ. The Commissioner considers that the requested information in this case is commercially marketable because the MoJ has ownership and possession of it.

For section 43 to apply it is also necessary for the public authority to demonstrate that disclosure of the information would or would be likely to prejudice someone's commercial interests – in this case the MoJ's own. The MoJ indicated to the

Commissioner that it had received professional advice that the database had the potential to attract significant revenue, which would be negated if it were to release the information to the complainant or anyone else.

20. In reaching his decision the Commissioner has followed the approach to relevant prejudice based exemptions set out by the Information Tribunal. In the case of *Hogan and Oxford City Council v Information Commissioner EA/2005/0026 and 30* the Information Tribunal set out that:

'Second, the nature of the 'prejudice' being claimed must be considered. An evidential burden rests with the decision maker to be able to show that some causal relationship exists between the potential disclosure and the prejudice and that the prejudice is... "real, actual or of substance". If the public authority is unable to discharge this burden satisfactorily, reliance on 'prejudice' should be rejected. ...'

In the case of *John Connor Press Associates Limited v The Information Commissioner EA/2005/0005* the Information Tribunal confirmed that 'the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk.' (para 15) This interpretation follows the judgement of Mr Justice Munby in *R (on the application of Lord) v Secretary of State for the Home Office [2003]*. In that case, the view was expressed that, '

Likely connotes a degree of probability that there is a very significant and weighty chance of prejudice to the identified public interests. The degree of risk must be such that there 'may very well' be prejudice to those interests, even if the risk falls short of being more probable than not.'

21. In reaching a finding on section 43 the Commissioner has considered the likelihood of and the degree of loss or harm to the MoJ as rights holder. The potential effects of disclosure that the Commissioner considers relevant to this case are:

- a) The loss of potential revenue stream. The Commissioner does not consider that a disclosure under the Act, clearly stating copyright conditions attached to the information would be likely to undermine the ability of MoJ to attract a private sector partner and would not be likely to prejudice its ability to exploit its intellectual property through licensing. The Commissioner notes that the MoJ is entitled to assert Crown copyright over the information. Guidance on the MoJ's website states:

'If an applicant wishes to use any information in a way that would infringe copyright, for example by making multiple copies, or issuing copies to the public, he or she would require a licence from the copyright holder.'

Since this is the case, the MoJ has a method for protecting its commercial interest in the requested information – either by refusing to issue a licence, or by realising a financial benefit through provision of a Value Added Licence. In the circumstances, the Commissioner considers that the MoJ is

able to take steps to eliminate any potential commercial prejudice from disclosure.

- b) The difficulty of policing intellectual property rights. The Commissioner has considered the nature of the information and in this case has concluded that the actions MoJ could take to enforce Crown copyright would protect its commercial interests. For another person to derive value from the information by providing it as a service it would have to be highly visible via the Internet as a service. The complexity of reconfiguring the information in the database dump for public use would make it likely that the number of services that could potentially use the information would be low. The Commissioner therefore considers that it will be possible for the MoJ to effectively police its intellectual property rights.

22. For the reasons set out above the Commissioner has decided that the section 43 exemption is not engaged in this case. The Commissioner is not satisfied that the disclosure of the information would or would be likely to prejudice the commercial interests of the MoJ.

Section 22(1)

23. The MoJ also claimed that section 22 applied to the information requested by the complainant. It explained in its letter of 7 February 2006 that the database was planned to be piloted for public access in April 2006 with a view to release later in the year. Section 22(1) provides that:

'Information is exempt information if-

(a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),

(b) the information was already held with a view to such publication at the time when the request for information was made, and

(c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a)

24. The Commissioner notes that the information requested by the complainant in the alternative request was for a database data dump from the 'Documents' database. The complainant pointed out in his complaint to the Commissioner that what the MoJ proposed to publish was not the statute law database in machine-readable format.
25. The Commissioner finds that section 22(1) does not apply, since the information which the MoJ proposed to release in the future was not the information which the complainant had requested as the database dump contains different information, such as metadata than compared to what would be published on the statute law website.

The Decision

26. The Commissioner's decision is that the public authority did deal with the 'primary request' in accordance with the Act, in that section 12 was applied correctly to the request.
27. It did not deal with the alternative request in accordance with the Act. It did not comply with its obligations under section 1(1) in that it failed to communicate to the complainant information to which he was entitled, on the mistaken basis that it was exempt from disclosure under sections 22(1) and 43(2) of the Act.

Steps Required

28. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
 - the MoJ should provide the complainant with the information in his alternative request (specified in paragraph 2 above), which it had claimed was exempt by virtue of sections 22(1) and 43(2) of the Act.

The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

29. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Other matters

30. Section VI of the Code of Practice (provided for by section 45 of the Act) makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information. As he has made clear in his *'Good Practice Guidance No 5'*, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that

a reasonable time for completing an internal review is 20 working days from the date of the request for review.

31. In exceptional circumstances it may be reasonable to take longer, but the total time taken should not exceed 40 working days, and as a matter of good practice the public authority should explain to the requester why more time is needed. Furthermore, in such cases the Commissioner expects a public authority to be able to demonstrate that it has commenced the review procedure promptly following receipt of the request for review and has actively worked on the review throughout that period.
32. The complainant's internal review request was made on 29 November 2005. The MoJ sent its internal review decision to him on 7 February 2006. The MoJ therefore took 47 working days to deal with the internal review. Accordingly, although he accepts that he had not at this time issued his latest guidance on the length of time which it was reasonable to take in completing internal reviews, the Commissioner wishes to register his view that the MoJ fell short of the standards of good practice in failing to conclude the internal review within a reasonable timescale.

Right of Appeal

33. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 13th day of February 2008

Signed

**Steve Wood
Assistant Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Section 43(1) provides that –

‘Information is exempt information if it constitutes a trade secret.’

Section 43(2) provides that –

‘Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).’

Section 43(3) provides that –

‘The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).’